PHILLIPS PETROLEUM CO.

IBLA 96-66 Decided September 24, 1998

Appeal from a decision of the Minerals Management Service denying a request for refund of royalties. MMS 92-0376-OCS.

Affirmed.

1. Outer Continental Shelf Lands Act: Refunds--Rules of Practice: Generally

A royalty payor may claim a refund of excess royalty payments by filing a written request within 2 years of the date payments were made in accordance with procedures prescribed by Congress in section 10 of the Outer Continental Shelf Lands Act of Aug. 7, 1953, 43 U.S.C. § 1339 (1994). While a lessee may offset overpayments found on a lease during an audit against underpayments discovered on that same lease, a payor may not intentionally create an underpayment by taking an unauthorized credit adjustment to recoup an overpayment made in a previous month because the payor would have effected a refund without satisfying the preconditions of section 10. MMS therefore may properly reject a request to refund a payment required by it to remedy an unauthorized underpayment as detected during its audit.

APPEARANCES: Carol J. Westmoreland, Esq., Houston, Texas, for Appellant; Howard W. Chalker, Esq., Peter J. Schaumberg, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Phillips Petroleum Company (Phillips) has appealed from an August 10, 1995, Decision of the Associate Director for Policy and Management Improvement, Minerals Management Service (MMS), denying its request for refund of royalties paid on production from OCS Lease 054-002254-0.

On May 20, 1992, Phillips requested a refund of $18,530.09 for royalty overpayments on OCS Lease 054-002254-0. On June 5, 1992, MMS denied the refund on the ground that it was beyond the 2-year limitation specified in

section 10(a) of the Outer Continental Shelf Lands Act of August 7, 1953, (OCSLA), 43 U.S.C. § 1339(a) (1994), because Phillips' payments were made on April 30, 1985, and September 26, 1986.

The August 10, 1995, Decision recites in pertinent part as follows:

> When Phillips submitted its August 1986 Form MMS-2014 for the March 1985 sales month for OCS Lease 054-002254-0, Phillips recouped the alleged overpayments without prior MMS approval or authorization pursuant to section 10. Phillips made an adjustment on the form to recoup the $18,530.09 excess payment. Because the unilateral recoupment did not comply with the refund provisions in section 10, on April 15, 1992, MMS assessed Phillips for making the unauthorized recoupment and ordered it to repay the $18,530.09. Phillips did not appeal the assessment. Phillips repaid the $18,530.09 by check dated May 13, 1992.
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> On May 20, 1992, Phillips submitted to MMS a refund request for the $18,530.09. By decision dated June 5, 1992, MMS denied Phillips' refund request. Phillips contends that its repayment on May 13, 1992, constitutes an overpayment of $18,530.09, and notified MMS that it intends to recover the $18,530.09 excess payment in accordance with Volume II , Chapter 4, Adjustments, Refunds and Recoupments of the MMS Oil and Gas Payor Handbook (1986) (Handbook) which states; "A two-year statute of limitations has been imposed by the OCS Lands Act for all refund/ recoupment requests. This means each request must be recovered by MMS within two years of the payment receipt date."

In its August 10, 1995, Decision, MMS stated the issue to be "[w]hether the 2-year statutory period in section 10 began on the original royalty payment date, or at the time when the unauthorized recoupment is repaid." MMS concluded that the 1985 and 1986 dates of Phillips' payments started the running of the 2-year limitation in section 10. MMS found that at the time Phillips made the May 13, 1992, repayment, the lease was underpaid because of Phillips' unauthorized recoupment, and when Phillips repaid the unauthorized recoupment, the lease was properly paid. Accordingly, MMS concluded, the May 13, 1992, payment was "not an excess payment within the meaning of section 10." (Decision at 4-5.)

In its appeal, Phillips asserts that the issue is "whether the MMS will be permitted to keep the $18,530.09 it has admitted throughout this process is in excess of the royalty due under the lease." Phillips notes that the phrase "making of the payment" in section 10 does not necessarily refer to an "initial" payment but should be taken to mean any payment "that the refund request applies to." (Notice of Appeal at 3.)

Phillips also argues that its 1986 Form MMS-2014 constitutes a request for refund/recoupment. MMS' August 10, 1995, Decision rejected this argument based on the MMS Handbook which specifically provides that "[a] payor

cannot recoup an overpayment on an OCS lease through entries to FORM MMS-2014 without receiving prior approval from MMS." (Decision at 5.)

MMS answers that the circumstances controlling the disposition of this case are the same as those in Taylor Energy Co., 139 IBLA 395 (1997). MMS has submitted a copy of its answer in that appeal. MMS also states that Phillips' 1986 Form MMS-2014 does not provide an avenue for refund or recoupment because Phillips repaid the $18,530.09 without filing an appeal.

[1] In relevant part, section 10(a) of OCSLA, 30 U.S.C. § 1339(a) (1994), provides:

> [W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after making of the payment * * *.

This provision confers authority upon the Secretary of the Interior to approve refunds for overpayment arising from OCS leases and also authorizes the Secretary of the Treasury to make the payments. Section 10(a) does not operate to extinguish a lessee's claim to moneys overpaid, but merely establishes authority for repayment of funds deposited in the Treasury upon the timely filing of a refund request. See Taylor Energy Co., supra; Shell Offshore, 96 IBLA 149, 165-67, 94 I.D. 69, 78-79 (1987).

Section 10 of OCSLA was repealed, effective August 13, 1996, by section 8(b) of the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996, Pub. L. No. 104-85, 110 Stat. 1700, 1716. However, Congress specified in section 11, 110 Stat. 1716, that the "amendments made by this Act, shall apply with respect to the production of oil and gas after the first day of the month following the date of the enactment of this Act." Thus, Congress reported:

> With respect to the repeal of section 10 of [OCSLA], the committee intends the prospective elimination of the OCSLA-imposed bar to lessees seeking refunds of overpayments more than two years later and the establishment of the same limitations period for OCS leases as for onshore Federal leases. Therefore, royalties which may have been overpaid for OCSLA lease production prior to enactment of this Act are not affected by this section.

H.R. Rep. No. 104-667, 104th Cong., 2d Sess., reprinted in 1996 U.S.C.C.A.N. 1442, 1450-51; accord, 142 Cong. Rec. H7606 (daily ed. July 16, 1996) (statement of Rep. Maloney).

In Chevron U.S.A., Inc. v. United States, 923 F.2d 830 (Fed. Cir. 1991), the Court concluded that, to qualify for a refund under section 10, a royalty payor must make a timely request and that the phrase "within two

years after the making of the payment" defines the timeliness of a refund request. Id. at 833. In Chevron, the payors made a refund request after litigation required MMS to retroactively apply rules reducing the royalties owed to the Federal Government. The Court held that such "discovery" of excessive payments does not constitute the "making" of a payment and ruled that the request was outside the 2-year limitation. Id. at 833-34.

The issue before the Board is whether "making of the payment" in this case should be construed as those excess royalty payments recouped in 1986 by the unauthorized credit adjustment or the payment in May 1992 tendered in response to MMS' order.

As we observed in Taylor Energy Co., supra, at 398, section 10 means literally what it says, that the request for repayment of excess royalties must be made within 2 years after "the making of the payment." It is well established that a refund claimant may not circumvent the refund procedures prescribed by Congress in section 10 by "offsetting" prior alleged overpayments against future payment obligations. Santa Fe Energy Co., 107 IBLA 121 (1989); Santa Fe Energy Co., 107 IBLA 32 (1989); Santa Fe Energy Co., 106 IBLA 333 (1989).

Thus, Appellant's attempt to recover overpayments without complying with section 10 was properly disallowed. Without a timely request for refund of overpayments in 1985 and 1986, Phillips' 1992 payment in response to the May 1992 MMS Order cannot be deemed to exceed the then-due royalty requirement, and therefore its refund request for that payment does not comply with the statute. Taylor Energy, supra, at 400-01.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision of the Associate Director for Policy and Management Improvement, MMS, is affirmed.

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James P. Terry
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge